

118 FERC ¶ 61,153
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

East Texas Electric Cooperative, Inc.
Tex-La Electric Cooperative of Texas, Inc.
Deep East Texas Electric Cooperative, Inc.

Docket No. EL07-27-000

Southwest Power Pool, Inc.

Docket No. ER07-396-000

(Consolidated)

ORDER ACCEPTING TRANSMISSION REVENUE REQUIREMENT AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued February 27, 2007)

1. On December 22, 2006, East Texas Electric Cooperative, Inc. (East Texas), Tex-La Electric Cooperative of Texas, Inc. (Tex-La), and Deep East Texas Electric Cooperative, Inc. (Deep East) (collectively the Cooperatives) filed for Commission approval to include their annual transmission revenue requirements in Southwest Power Pool, Inc.'s (SPP) open access transmission tariff (OATT or tariff). On December 29, 2006, SPP filed a companion docket pursuant to section 205 of the Federal Power Act (FPA) submitting revised pages to its tariff to incorporate into its tariff the annual transmission revenue requirements proposed by the Cooperatives. As discussed below, we accept for filing the revisions to SPP's tariff reflecting the Cooperative's annual transmission revenue requirements to become effective February 28, 2007, subject to refund, and establish hearing and settlement judge procedures.

Background

2. East Texas and Tex-La are generation and transmission cooperatives that are non-Transmission Owners in SPP. Deep East is a distribution cooperative member of Tex-La and is not a member of SPP. The Cooperatives are all borrowers from the Rural Utilities Service (RUS), and therefore, are not subject to the Commission's jurisdiction under

sections 205 and 206 of the FPA.¹ Nevertheless, the courts have held that the Commission “may analyze and consider the rates of non-jurisdictional utilities to the extent that those rates affect jurisdictional transactions.”²

3. The Cooperatives state that since their entrance into SPP, they have planned to turn functional control of their transmission facilities over to SPP and to change their status to Transmission Owners. The Cooperatives explain that their efforts were hindered by lack of clarity concerning which of the Cooperatives’ facilities would be considered “transmission” and the absence of a mechanism in SPP’s tariff to allocate transmission revenues among multiple Transmission Owners in a single pricing zone.

4. SPP recently incorporated a new definition of Transmission Facilities into its tariff as Attachment AI,³ which was approved by the Commission in *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,255 (2005), *order on reh’g*, 114 FERC ¶ 61,242 (2006) (*Southwest Power Pool*). In addition, SPP recently developed a new mechanism for allocating transmission revenues among multiple Transmission Owners in a single SPP pricing zone. This mechanism, incorporated into Attachment L of the SPP tariff, was also approved by the Commission in *Southwest Power Pool*. With these recent changes to SPP’s tariff, the Cooperatives argue that they can now become Transmission Owners in SPP.

5. On April 25, 2005, SPP’s Board of Directors approved East Texas’ and Tex-La’s application to become Transmission Owners, authorized the placement of the Cooperative’s facilities under the SPP tariff, and authorized SPP to make the necessary FERC filing to effectuate these changes. As such, the Cooperatives are submitting their revenue requirements to the Commission for approval in the instant proceeding.

¹ Energy Policy Act of 2005 § 1291(c), 119 Stat. 985 (amendment to FPA § 201(f) codifying exemption from FPA jurisdiction for electric cooperatives with RUS financing and electric cooperatives selling less than 4 million MWh per year).

² *Pacific Gas & Electric Co. v. FERC*, 306 F.3d 1112 at 1114 (D.C. Cir. 2002).

³ Section I of Attachment AI of the SPP tariff provides (in part):

Transmission Facilities shall be the facilities which meet the criteria specified in this Attachment and which are used by the Transmission Provider to provide transmission service under Part II, Part III, and Part V of the Tariff.

Instant Proceeding

6. In their filing, East Texas and Tex-La state that they are planning to become Transmission Owners under the SPP tariff and Membership Agreement and turn functional control of their Transmission Facilities over to SPP in return for an allocation of SPP's transmission revenues. Deep East states that, although it will not become a member of SPP, it is planning to turn functional control of its Transmission Facilities over to SPP and Tex-La will serve as the Transmission Owner in SPP with respect to the Deep East facilities. The Cooperatives propose that their revenue requirements become a component of SPP's Pricing Zone 1⁵ rate.

7. East Texas and Tex-La claim that they qualify to become Transmission Owners in SPP pursuant to sections 1.14 and 1.15 of the SPP Membership Agreement and section 1.45a of SPP's OATT. The Cooperatives also claim that the relevant portion of their facilities meet the definition of Transmission Facilities under Attachment AI⁴ to the SPP tariff.⁵ The Cooperatives state that the overall level of investment resulting in annual revenue requirements is as follows for the 2005 test year: East Texas - \$2,733,879, Tex-La - \$588,874, Deep East - \$428,131.⁶ The Cooperatives explain that they used a simplified version of the formula rate templates SPP is currently developing to determine their revenue requirements.

8. The Cooperatives note that the Commission has not established a formal standard of review to be applied in all non-jurisdictional transmission revenue requirement cases but considers the issue on a case-by-case basis.⁷ The Cooperatives argue that when the Commission reviews the revenue requirements of non-jurisdictional utilities that voluntarily seek to include their revenue requirements in the jurisdictional rates of a regional transmission organization (RTO), the Commission should not apply a strict section 205 standard of review because their revenue requirements are already subject to review by RUS. Further, the Cooperatives contend that none of the four non-jurisdictional Transmission Owners in SPP have had their revenue requirements subject

⁴ Direct testimony and exhibits of George A. Kithas.

⁵ The Cooperatives note that not all of their facilities qualify under Attachment AI. East Texas has 84.9 line miles of Transmission Facilities, Tex-La has 31.4 miles of 138 kV Transmission Facilities, and Deep East has 19.6 line miles of 69 kV Transmission Facilities and 41.4 miles of 138 kV Transmission Facilities that meet the definition in Attachment AI.

⁶ Direct testimony of David M. Brian and Robert C. Smith.

⁷ See *City of Anaheim*, 112 FERC ¶ 61,208, at 62,075 (2005).

to section 205 review,⁸ and the Cooperatives should not be singled out for a higher standard of review. The Cooperatives state that, if the Commission does decide to apply a strict section 205 standard of review, they have provided the Commission with the information necessary for such review.

9. The Cooperatives request that the Commission waive the 60-day notice period allowing the revenue requirements to become effective January 1, 2007. The Cooperatives explain that they are requesting the January 1, 2007 date in order to coincide with the effective date requested by SPP in its section 205 filing in Docket No. ER07-396-000, which requests approval of the necessary tariff changes to incorporate East Texas and Tex-La into SPP as Transmission Owners, and including the respective revenue requirements, has a requested effective date of January 1, 2007.⁹

Notice of Filings and Responsive Pleadings

10. Notice of the Cooperatives' filing in Docket No. EL07-27-000 was published in the *Federal Register*, 72 *Fed. Reg.* 1,498 (2007), with motions to intervene and protests due on or before January 11, 2007. SPP filed a timely motion to intervene. American Electric Power Service Corporation (AEP) filed a timely motion to intervene and protest.¹⁰ An untimely joint motion to intervene was filed by Oklahoma Municipal Power Authority and West Texas Municipal Power Agency (collectively, the Power Authorities). On January 26, 2007, SPP filed an answer to AEP's protest. On January 31, 2007, the Cooperatives filed an answer to AEP's protest and SPP's answer.

11. Notice of SPP's filing in Docket No. ER07-396-000 was published in the *Federal Register*, 72 *Fed. Reg.* 1,504 (2007). East Texas filed a timely motion to intervene.

12. In its protest, AEP states that the rate treatment of transmission facilities in SPP owned by the Cooperatives has long been disputed with East Texas attempting to transfer the costs of the facilities back to AEP's affiliate, SWEPCO, customers. AEP explains that in the late 1980s and early 1990s, East Texas, Tex-La and SWEPCO entered into a

⁸ The four non-jurisdictional Transmission Owners in SPP are: City of Springfield, Grand River Dam Authority, Western Farmers Electric Cooperative, and Sunflower Electric Power Corporation.

⁹ In Docket No. ER06-396-000, SPP requests an effective date of January 1, 2007 for the proposed tariff changes, or whatever date the Commission assigns to Docket No. EL07-27-000.

¹⁰ AEP acts as agent for the operating companies of Southwestern Electric Power Company (SWEPCO) and Public Service of Oklahoma.

power supply arrangement to lower their power costs and East Texas agreed to construct and pay for transmission facilities to support the transfer of loads from the Texas Utilities Electric Company System located in the Electric Reliability Council of Texas (ERCOT) to SWEPCO. AEP states that in Opinion No. 475, the Commission found East Texas was not entitled to receive transmission credits for these facilities because East Texas failed to show that its facilities: (1) were integrated with SWEPCO's transmission system; and (2) provided additional benefits to the transmission grid in terms of capability or that they can be relied on by the transmission provider for the coordinated operation of the grid.¹¹ AEP argues that the instant filing is the Cooperatives' second attempt to have customers other than their own bear most of the costs of these facilities.

13. AEP notes that the 138-kV loop facilities East Texas included in the instant filing were part of the facilities for which East Texas unsuccessfully sought transmission service credits in Opinion No. 475. AEP argues that the facilities should not be included in the Cooperatives' proposed revenue requirement because the practical effect will be that AEP's native load customers would carry approximately 80 percent of the cost of the facilities. AEP also contends that, consistent with the reasoning in Opinion No. 475, the facilities in question should be designated as Direct Assignment Facilities, which are specifically excluded from the definition of Transmission Facilities in SPP's Attachment AI. According to AEP, the costs of the facilities should not be rolled-in because doing so would create an involuntary pool.¹²

14. AEP notes that Tex-La and Deep East's radial facilities in the instant proceeding were not included in Opinion No. 475. However, AEP argues that these facilities are also Direct Assignment Facilities and should not be included in SPP Pricing Zone 1. AEP maintains that radial transmission lines are often cited as examples of facilities justifying direct assignment treatment and argues that Tex-La and Deep East's radial facilities do not satisfy the test set forth in Mansfield for determining whether radial lines exhibit any degree of integration.¹³ AEP also contends that the proposal to include Deep East's facilities in the revenue requirement is particularly questionable because Deep East is a

¹¹ *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, 108 FERC ¶ 61,079 (2004), *reh'g denied*, 114 FERC ¶ 61,027 (2006) (Opinion No. 475). These opinions are currently on appeal before the United States Court of Appeals for the D.C. Circuit.

¹² AEP contends that pools are only fair when each participant contributes resources more or less commensurate with the benefits it receives.

¹³ *Mansfield Municipal Electric Department v. New England Power Co.*, 94 FERC ¶ 63,023, *aff'd*, 97 FERC ¶ 61,134 (2001), *reh'g denied*, 98 FERC ¶ 61,115 (2002) (*Mansfield*).

distribution cooperative. Accordingly, AEP requests that the Commission reject the Cooperatives' filing or set the issue for hearing and direct the Cooperatives to further prove that the facilities are not more properly classified as Direct Assignment Facilities under SPP's tariff.

15. The Power Authorities state that, in serving their respective loads, each depends to some degree on the use of transmission facilities that are subject to the SPP regional tariff. For this reason, they state that they have a direct interest in the proceeding and should be made parties to the proceeding. The Power Authorities further assert that SPP's and the Cooperatives' answers indicate that the Commission's decision could affect the Power Authorities' interests.

16. SPP states in its answer to AEP's protest that SPP takes no position whether the facilities in question should be classified as Transmission Facilities pursuant to Attachment AI. SPP does urge the Commission not to make a determination that is inconsistent with Attachment AI of its tariff. SPP contends that because the Commission already determined that Attachment AI is just and reasonable in Southwest Power Pool, the Commission should use the Attachment AI to determine which of the facilities in the instant proceeding are Transmission Facilities.

17. In its answer, the Cooperatives assert that AEP's position is based on a flawed reading of SPP's tariff. Specifically, the Cooperatives argue that AEP is improperly trying to read an integration test into SPP's tariff where the tariff provides for no such test. The Cooperatives contend the relevant issue in this proceeding is whether the facilities meet the definition of Transmission Facilities in Attachment AI, and not whether they meet the Mansfield integration test. According to the Cooperatives, their facilities clearly meet the bright-line definition of Transmission Facilities in section II of Attachment AI, and do not fall within the Direct Assignment Facilities exception in section III of Attachment AI. The Cooperatives argue that Direct Assignment Facilities only include facilities that a transmission or generation customer agreed to have directly assigned to them by SPP before they are built, which is not the case for the facilities in the Cooperatives' filing. Lastly, the Cooperatives explain that AEP was deeply involved in the stakeholder negotiations that developed the definition of Transmission Facilities and AEP understood the stakeholders' intent to establish a bright-line definition rather than rely on the integration test.

Discussion

A. Procedural Issues

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings. We will also grant Power Authorities' motion to intervene out-of-time given the early stage of these proceedings,

their interest in these proceedings, and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (a)(2) (2006), prohibits answers to protests and answers unless otherwise ordered by the decisional authority. We will accept the answers filed by SPP and the Cooperatives because they have provided information that assisted us in our decision-making process.

B. Waiver

19. The Cooperatives request waiver of the Commission's 60-day prior notice requirement to allow an effective date of January 1, 2007. In *Central Hudson Gas and Electric Company, et al.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992), and *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61, 139, clarified, 65 FERC ¶ 61,081 (1993), the Commission determined that waiver of notice would be granted for this type of filing only upon the showing of extraordinary circumstances. The Commission's regulations require that a party seeking waiver demonstrate that good cause exists supporting such a waiver, including specific showings of: (1) how and to what extent the filing utility and its purchasers will be affected if the notice requirement is not waived; and (2) the effects of the waiver on purchasers under other rate schedules. SPP has not made such a showing, therefore, the request is denied.

20. Accordingly, the proposed revisions to SPP's tariff sheets will become effective on February 28, 2007, which is after sixty (60) days' notice from the date of filing, subject to refund and the outcome of the settlement judge proceedings directed below.¹⁴

C. Analysis

21. We find that the record before us does not provide enough information for us to determine the basis for the annual revenue requirements proposed in Docket No. EL07-27-000. Further, based on the information before us, we are unable to determine whether the facilities in question meet the criteria for Transmission Facilities as set forth in Attachment AI of SPP's tariff and should be included in SPP's Pricing Zone 1 or whether they are Direct Assignment Facilities, which SPP's Attachment AI specifically excludes. Therefore, we find that the Cooperatives' proposal in Docket No. EL07-27-000 and SPP's filing in Docket No. ER07-396-000 raise issues of material fact related to the basis

¹⁴ Absent waiver, public utilities must provide the Commission at least 60 days prior notice before any proposed rate, term, or condition is to become effective. Therefore, the earliest date that proposed, rates, terms, or conditions may become effective, absent waiver, is the 61st day after filing, *i.e.* the day after the 60-day prior notice period has expired. Thus, for SPP's December 29, 2006, filing, the earliest permissible effective date is February 28, 2007.

for annual revenue requirements and whether the facilities in question are Transmission Facilities pursuant to SPP's Attachment AI. The Commission further finds that these issues cannot be resolved based on the record before us; rather, they are more appropriately addressed in a hearing and settlement judge procedures ordered below.

22. Our preliminary analysis indicates that SPP's proposed tariff sheets in Docket No. ER07-396-000 have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the proposed tariff sheets, make them effective February 28, 2007 to coincide with Docket No. EL07-27-000, subject to refund and to further Commission order, and set them for hearing and settlement judge procedures with regard to the issues stated above.

23. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁵ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁶ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) The Cooperatives' and SPP's proposals are hereby accepted for filing to become effective February 28, 2007, subject to refund and further Commission order, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly

¹⁵ 18 C.F.R. § 385.603 (2006).

¹⁶ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulation under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the cost of service basis for the proposed rates. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedures.

(F) The untimely motion to intervene of Oklahoma Municipal Power Authority and West Texas Municipal Power Authority is hereby accepted.

(G) Docket Nos. ER07-396-000 and EL07-27-000 are hereby consolidated.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.